BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NAM LE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,643
ARMOUR ECKRICH MEATS	)	
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the June 3, 2013, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on September 10, 2013.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Additionally, at the oral argument to the Board, respondent stipulated that it did not dispute the fact claimant suffered a slip and fall on August 8, 2011, which arose in the course of her employment with respondent. The dispute regarding whether claimant's injuries and disability arose out of the employment remain.

ISSUES

The ALJ found that claimant's T10 fracture arose out of and in the course of her employment. The ALJ went on to find, prior to her work accident of August 8, 2011, claimant was working full-time and doing her job without limitations, despite having osteoporosis. After her accident, claimant was severely limited in what she was physically

able to do because of the pain that she has experienced since the accident of August 8, 2011. Because of claimant's difficulty communicating in and understanding English, and her age, the ALJ found claimant to be permanently and totally disabled as the result of this accident. Respondent and its insurance carrier were ordered to pay all authorized medical expenses related to treatment of the claimant's injuries, subject to the Kansas Workers Compensation Schedule of Medical Fees. Claimant was awarded future medical benefits to be considered upon proper application to and approval by the Director. Respondent was also ordered to provide claimant with pain management care.

Respondent appeals and argues that, although claimant sustained an accident and injury on the date alleged at work, the ALJ's Award should be reversed as claimant's untreated osteoporosis is the prevailing factor in her current need for medical treatment and permanent disability/impairment. Respondent argues claimant's injury did not arise out of and in the course of claimant's employment because it was caused by a personal risk, that the accident did not render claimant permanently and totally disabled, and that claimant is also not entitled to a permanent whole person functional disability award, a permanent partial general (work) disability or a permanent total disability award as the result of this accident. Should the Board find otherwise, respondent argues claimant is entitled to no more than a 15 percent permanent partial whole body functional disability.

Claimant argues the Award should be affirmed. Claimant contends that the greater weight of the evidence proves she possessed the ability to perform her physically demanding work duties and her activities of daily living before her traumatic fall on a wet and icy concrete cooler floor while working for respondent. But now, as a result of the combination of the physical injury and an aggravation of a preexisting condition, she is left with permanent injuries and resulting chronic pain. Accordingly, claimant contends she is permanently and totally disabled from substantial employment, and is in need of future medical treatment for the management of her severe chronic pain. Should the Board find claimant is not entitled to a permanent total disability award, claimant argues she is entitled to a 93.7 percent work disability.

The issues raised by respondent on appeal are:

> "1. Was claimant's accident the prevailing factor in causing;
>
> (a) injury;
> (b) medical condition; and
> (c) resulting disability/impairment?

2. Did claimant suffer an injury by accident arising out of her employment?[1]

3. Did claimant's injury arise out of a personal risk?

4. Has the claimant been rendered permanently and totally disabled on account of her injury?

5. What is the claimant's functional impairment?

6. Is the claimant entitled to work disability benefits?

7. Is the claimant entitled to future medical treatment?"[2]

FINDINGS OF FACT

Claimant came to the United States in 1991. She became an American citizen in 2011. Claimant finished to the 12th grade in Vietnam. She speaks very little English and testified that she is unable to read or write English. However, vocational expert Steve Benjamin reported that claimant obtained a Kansas drivers license after taking the test in English. Claimant worked for respondent for 11 years and 8 months. She worked on line food production and packing production.

Claimant suffered an injury to her low back on August 8, 2011, when she slipped and fell on the concrete floor of the cooler. Claimant testified that she felt immediate pain in her lower back after she hit the floor. She was taken by ambulance to the hospital, where x-rays were taken and she was given an injection to relieve the pain. She was then released to go home. Claimant was able to return to work on light duty, but continued to have pain and it was difficult for her to work. Claimant took a few days off and later her doctor took her off work. Claimant had an MRI on August 15, 2011, and again in late December 2011. The last day claimant worked for respondent was November 23, 2011.

Currently, claimant does not believe she is physically able to work because she can't stand or sit for very long. She testified that she changes positions every hour and then has to lay down. Claimant testified that pain medication and heat packs help relieve some of

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[1] At the oral argument to the Board, respondent acknowledged that claimant did suffer a slip and fall on August 8, 2011, which arose in the course of her employment. Whether the accident arose out of her employment remained in dispute. However, at the regular hearing before the ALJ, respondent admitted that claimant suffered personal injury which arose both out of and in the course of her employment with respondent. The dispute was actually whether the accident was the prevailing factor leading to the permanent nature of claimant's condition and whether it stems from the fall. The attorney for respondent properly identified the dispute more as a nature and extent issue.

[2] Application for Review (filed June 4, 2013).

the pain. She is unable to fully perform activities of daily living, such as cooking or cleaning. She can boil water and make sandwiches. Claimant lives alone, but her children come over on the weekends to help her, and she has friends who come by during the week to help her. She does not believe she can work anywhere for 8 hours a day because she can not stand or walk without support. Claimant describes her pain as sharp. She denied having any pain in her mid or low back before the August 2011 accident.

Claimant is living off of her savings and borrows money from her children to pay her bills. Claimant qualified for Social Security disability. Claimant's medications include ibuprofen, hydrocodone and morphine. For her work-related injuries, claimant was treated by board certified orthopedic surgeon John M. Ciccarelli, M.D. She had also been receiving treatment for her low back pain with her family physician, David Johnson, M.D. Claimant last met with Dr. Ciccarelli in December 2012. Dr. Johnson was tasked with providing claimant with her pain medication.

Claimant testified that she had prior shoulder and low back pain and went to Dr. Johnson in August 2010 to obtain pain medication for her pain. At the regular hearing, claimant denied having any condition related to weak or brittle bones. Claimant doesn't recall any doctor telling her she had weak bones before her August 8, 2011, accident. Claimant claims she rarely went to the doctor before the accident. She testified that she had not been to a doctor during the year before the accident. The last time she went to a doctor before the accident was in 2008, although she did receive allergy medication in 2011.

Kim Norris, safety manager for respondent, testified that her job is to ensure respondent follows OSHA-related standards and company policies as well as handling workers compensation claims. Ms. Norris testified she would set up appointments for medical care and would work with employees to find work for those with restrictions. She works with the HR manager and the plant manager to determine what work an employee with restrictions can perform and then they all meet with the employee to discuss the options.

Ms. Norris testified that she believes claimant could have been accommodated after she was released by Dr. Ciccarelli. Claimant would have also been able to earn the same wages. She was unaware that Dr. Johnson and Dr. Murati reported claimant essentially couldn't work anymore. Ms. Norris did testify that, based on Dr. Murati's restrictions read to her at her deposition, claimant could not be accommodated. She confirmed that Dr. Johnson and Dr. Murati were not authorized treating physicians for claimant's workers compensation claim.

David Johnson, M.D., board certified in family practice, testified that he has been claimant's family physician since November 7, 2009. At that time claimant presented with back pain. Dr. Johnson admitted claimant to the hospital with a diagnosis of urinary tract infection. Claimant was seen again August 6, 2010, with complaints of low right side back

pain, sometimes with pain down the left leg. Dr. Johnson had no treatment recommendations for claimant.

Dr. Johnson met with claimant again on August 23, 2011, at which time claimant presented with complaints of tenderness in her low back and upper lumbar, with paraspinal tightness. At this time, claimant reported the fall at work. Claimant was seen again on September 7, 2011, and complained of pain in the mid thoracic area. On September 29, 2011, claimant reported back pain and was found to have a T10 fracture. On October 12, 2011, claimant was complaining of pain in the middle of her back. In November 2011, claimant was again started on the medication, Boniva, for osteoporosis. Dr. Johnson's records indicated claimant had been on Boniva for two years, which he determined meant two years before the accident. Claimant stopped taking Boniva on March 14, 2012. This was not at the doctor's instruction.

Dr. Johnson testified that claimant's condition was explained to her and he felt that she understood the significance of the diagnosis. However, claimant testified that she was unaware that she had osteoporosis, which would contradict Dr. Johnson's records. Based on bone density testing, claimant's osteoporosis in her spine was severe. Osteoporosis, left untreated, could get worse and fractures could occur, along with a lot of pain. Dr. Johnson testified that there was no evidence that claimant had osteoporosis before she fell and suffered the fracture, but that it was likely that the osteoporosis started long before the fall.

Claimant underwent a bone density test to look for evidence of osteopenia or osteoporosis. The T-score from that test was minus 4.2, the femoral neck minus 2.4 and the hip minus 2.2. Osteoporosis is defined as at or greater than minus 2.5. Claimant's minus 4.2 would be classified as severe osteoporosis. Osteoporosis, without treatment, would worsen. The Boniva is intended to slow the progressive speed of the osteoporosis. Dr. Johnson agreed that if claimant had not had the work-related injury, but still had the osteoporosis, she could be causing herself fractures. The resulting fractures could cause chronic pain. It was his opinion that claimant would be best served to be treating in some fashion for her osteoporosis. He acknowledged the osteoporosis disease process, while asymptomatic before the fall, more than likely had started long before the fall.

Dr. Johnson testified that he was never the treating physician for the T10 fracture, and that he was only treating claimant for pain. He never saw any of claimant's MRIs. He did have an x-ray and a September 2011, CT scan of the abdomen, of which mentioned a subacute compression fracture of the T10 vertebra. He felt claimant was fully capable of working. Claimant continued to have pain over several months and Dr. Johnson felt that she needed to be on medication to get the osteoporosis under control or to at least stop it from getting worse. Dr. Johnson believes claimant's current ongoing back pain is causally related to the fall on August 8, 2011. He indicated that claimant's current inability to work is related to the pain that stems from the August 8, 2011, fracture. According to

Dr. Johnson, the prevailing factor is the T10 thoracic fracture. However, on cross examination, he agreed that micro fractures can cause chronic pain with osteoporosis.

Claimant met with Dr. Ciccarelli, on September 1, 2011. This was a referral visit related to her work injury. Claimant reported significant pain across her thoracic area. She was wearing a back brace and was being accommodated at work, but unable to work a full 12 hour shift. Her pain was worse with bending, lifting, twisting, prolonged sitting or standing. Claimant's August 15, 2011, MRI revealed a fairly new fracture involving the T10 verterbral body, which Dr. Ciccarelli classified as a burst fracture involving the front and middle part of the spine. Claimant also had an old fracture at T9. He also noted that claimant had a history of osteoporosis. Dr. Ciccarelli stated in his September 1, 2011, report that claimant had a history of osteoporosis, as "noted on prior bone densitometry evaluation back in 2008."[3]

Upon examination, Dr. Ciccarelli found claimant to have an antalgic gait, and discomfort across the thoracolumbar region with palpation. He recommended claimant take a week off work and then return to 4 hours a day on light duty to include no lifting over 10 pounds, avoid repetitive bending and lifting maneuvers and alternate sitting and standing every 15 minutes as needed. Dr. Ciccarelli indicated that over an 8 week period claimant would be able to increase her work day by 1 hour per week, which would put her back at 12 hours a day. He also recommended claimant get a current bone density scan.

Claimant was seen again on September 29, 2011, for followup. Dr. Ciccarelli instructed claimant to continue with care and restrictions. An additional restriction of being able to lie down on breaks was added. X-rays taken showed that the T10 fracture was healing. On November 15, 2011, Dr. Ciccarelli again stressed that claimant get another bone density scan. He also indicated claimant was taking Boniva for osteoporosis. On December 22, 2011, claimant continued to complain of back pain and at times some radiculitis or nerve irritation in the left leg. Dr. Ciccarelli again inquired about claimant's bone density results, he recommended claimant continue with her restrictions and recommended an MRI of the lumbar spine. He also put claimant in a softer back brace.

On January 16, 2012, Dr. Ciccarelli indicated in a letter that he had finally received claimant's bone density study, which revealed claimant was grossly osteoporotic in the lumbar spine. He suspected claimant's bones were very brittle and predisposed to minor trauma in a way it wouldn't affect someone else given the type of fracture she sustained in the fall. He indicated that had claimant not suffered from osteoporosis she would not have suffered such a serious fracture. Dr. Ciccarelli testified that the accident was the prevailing factor in causing claimant's T10 injury.

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[3] Ciccarelli Depo., Ex. 1 at 20.

On January 19, 2012, Dr. Ciccarelli opined that claimant's fracture was healed and released her to return to work without restrictions. He also found her to be at maximum medical improvement for the T10 fracture. Secondary to her osteoporosis, claimant was instructed to be off work until she is aggressively treated for such condition by her primary care physician. He opined that if claimant did not receive treatment for the osteoporosis, she would likely develop a progressing deformity of her spine called hyperkyphosis. He testified that hyperkyphosis is where the spine, through microfractures, presents chronic pain, limited mobility and eventual collapse of the spine. He felt that claimant could not go back to work because of her underlying medical issue as opposed to her fall.

On October 31, 2012, Dr. Ciccarelli rated claimant with a 20 percent permanent partial impairment, secondary to the severe thoracic fracture. He wrote that 5 percent of this is apportioned for the severe osteoporosis, which leaves claimant with a 15 percent impairment secondary to the work-related injury. Any future medical treatment would, in his opinion, be due to the osteoporosis and not the fracture.

Dr. Ciccarelli had the opportunity to review the task list of Steve Benjamin and opined that based on the fracture alone, claimant's task list would be zero, finding that claimant is capable of performing all of the tasks on the list.

At the request of her attorney, claimant met with board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on November 8, 2011. Claimant's chief complaints were low back and mid back pain and swelling; the back pain occasionally radiating down the left leg; stomach pain with intense back pain; trouble sitting and standing for long periods of time; and trouble walking. Dr. Murati examined claimant and reviewed her medical records and opined that she had a thoracic sprain; greater than 50 percent thoracic compression fracture, for which she was at maximum medical improvement; and low back pain with signs and symptoms of radiculopathy. Dr. Murati noted claimant's preexisting low back injury, which he stated had resolved. Claimant's osteoporosis was not mentioned in Dr. Murati's original report.

Dr. Murati went on to opine that his diagnoses are, within reasonable medical probability, a direct result of the work-related injury on August 8, 2011, during claimant's employment with respondent. He assigned the following temporary restrictions: no bending, crouch or stooping; no lifting, carrying, pushing or pushing over 10 pounds, 10 pounds rarely, 5 pounds occasionally; rarely climb stairs, ladders or squat; no crawling; occasionally kneel, sit, stand and walk, with the ability to alternate; occasional driving, and avoid trunk twisting.

In terms of treatment, Dr. Murati recommended physical therapy, anti-inflammatory and pain medication for the thoracic spine; for the low back an MRI of the lumbar spine to rule out disc pathology, a bilateral lower extremity NCS/EMG to include the lumbar paraspinals to evaluate and or document any radiculopathy. Based on these results physical therapy, anti-inflammatory medication and pain medication would be

recommended, along with a series of lumbar epidural steroid injections. He went on to state that if claimant showed no improvement from the recommended conservative treatment, a surgical evaluation would be next.

Dr. Murati opined that the prevailing factor in the development of claimant's conditions is the accident at work and the subsequent lack of appropriate treatment.

Dr. Murati saw claimant for another examination on April 10, 2012. She had complaints of constant low back and mid back pain; occasional radiating pain down the left leg; trouble sitting and standing for longer than 15 minutes; difficulty walking for more than 10-15 minutes, with her legs feeling like they are going to give out on her. Dr. Murati examined claimant and found her to have greater than 50 percent thoracic compression fracture, for which she was at maximum medical improvement; and low back pain with signs and symptoms of radiculopathy. He also noted that claimant had severe burns to the upper part of her back and entire low back from chronic application of heating pads.

At the time of this second examination, Dr. Murati had been provided the bone density examination results from Dr. Joy Johnson showing claimant's osteoporosis. He acknowledged a person with untreated osteoporosis would be at a higher risk of sustaining a compression fracture. He agreed the T9 fracture preexisted the accident at work. He also agreed that untreated osteoporosis would cause the condition to worsen at a quicker rate.

Dr. Murati found claimant to be essentially and realistically unemployable. He felt claimant was in need of chronic pain management and needed to apply for Social Security disability. He continued to opine that his diagnoses are within all reasonable medical probability a direct result from the work-related injury on August 8, 2011, during claimant's employment with respondent. He went on to opine claimant has a 24 percent whole person impairment (15 percent impairment for the thoracic compression fracture, combined with a 10 percent impairment for the low back pain with signs and symptoms of radiculopathy. Dr. Murati did not rate claimant for thoracic spine radiculopathy).

Dr. Murati went on to assign permanent restrictions of: no bending, crouch or stooping; no lifting, carrying, pushing or pushing over 10 pounds, 10 pounds occasionally or 5 pounds frequently; rarely climb stairs, ladders or squat; no crawling, occasionally kneel, sit, stand and walk; occasional driving, and avoid trunk twisting. Finally, Dr. Murati found claimant could no longer perform 6 out of 7 tasks for a 86 percent task loss.

Vocational expert Steve Benjamin interviewed claimant on November 7, 2012, in order to provide a vocational opinion. Mr. Benjamin identified seven tasks claimant has performed over the previous 15 years and opined that, considering Dr. Ciccarelli's posed permanent restrictions, it would appear that claimant would be able to perform all of her prior work tasks, therefore there would be no task loss. He went on to find that claimant's wage loss was 100 percent as claimant was not working at the time of the interview and

had not worked since her last day at respondent. He felt that claimant could return to work for respondent with no wage loss, or to a similar position at a comparable wage.

Mr. Benjamin noted that claimant applied for and began receiving Social Security disability benefits, which means she had to meet one of the criteria, which are: 1. must be deemed permanently and totally disabled; 2. the injury or illness must meet a certain level of severity, regardless of whether you can still work or not; 3. medical vocational grid rule or guideline based on the individual's past education, if they have transferrable skills, past relevant work history and age. He was not sure which criteria qualified claimant. In his expert opinion, claimant can work pursuant to the medical opinion of Dr. Ciccarelli.

Claimant was interviewed by Robert Barnett, Ph.D., for a vocational assessment on May 17, 2012. Dr. Barnett found given claimant's age, limited education, limited English skills, physical restrictions, and lack of employment opportunities, that claimant appeared to be essentially unemployable. Claimant was found to have a 100 percent wage loss since she was not working, and, based on the restrictions of Dr. Murati, had an 86 percent task loss for a 93 percent work disability.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B) states:

> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> . . .
> (B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
> (iii) accident or injury which arose out of a risk personal to the worker; or
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g) states:

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

There is no real dispute whether claimant suffered an accident as is defined in the Kansas Workers Compensation Act (Act). Claimant slipped on a concrete floor and landed on her buttocks. She suffered immediate pain and was transported to the hospital by ambulance. The serious dispute centers around the results of that fall and how claimant's osteoporosis condition caused or contributed to claimant's injuries, impairment and disability.

There is little serious dispute that claimant's osteoporosis preexisted the fall. She had low back pain with radiculopathy in 2010, while being treated by Dr. Johnson. The MRI performed after the fall identified not only the T10 fracture, but also a prior T9 compression fracture as well. Dr. Johnson noted claimant had been on Boniva, a medicine

for the treatment of osteoporosis, for two years when he examined her after the fall. Even though he did not know when this two year period occurred, he opined it was before the fall. Additionally, the bone density scan performed on claimant was classified as severe. Dr. Johnson stated it was one of the most severe he had ever seen. Dr. Johnson acknowledged claimant's osteoporosis would have developed well before the fall at work.

Dr. Ciccarelli also opined that claimant's osteoporosis preceded the fall. He identified the T9 fracture as being old. He agreed that the fall contributed to the compression fracture at T10. However, he cautioned claimant would continue to develop worsening problems if her osteoporosis was not properly treated. He expressed concern at claimant's reluctance to admit that she had an ongoing problem. Dr. Ciccarelli found claimant's T10 fracture to have healed at the last examination. He rated claimant at 20 percent to the whole person, 15 percent for the fracture and 5 percent for the preexisting osteoporosis. In his opinion, claimant could return to work for respondent without limitation from that fracture. Any limits to her ability to work stemmed from the ongoing osteoporosis and not the fracture. The osteoporosis was the prevailing factor in claimant's inability to return to work. He provided claimant with no restrictions and gave no task loss for the T10 fracture.

Dr. Murati attributed all of claimant's ongoing problems and her inability to work to the T10 fracture. He assessed claimant a 24 percent whole person functional impairment, of which 15 percent stemmed from the compression fracture and 10 percent stemmed from low back pain with symptoms of radiculopathy. He assessed no impairment for radiculopathy from the T10 fracture. He was unwilling to attribute any of claimant's ongoing problems to the osteoporosis. Although he agreed that if claimant failed to obtain treatment for the osteoporosis her condition would not only worsen, but would worsen at an accelerated rate. When Dr. Murati was asked whether a diagnosis of osteoporosis, without a work injury could prevent claimant from returning to the open labor market, he answered in circles, never actually addressing the question. He did agree that osteoporosis would put claimant at a greater risk of a fracture.

The Board agrees claimant's osteoporosis is a preexisting condition which contributed to the T10 compression fracture. However, the fall experienced by claimant was traumatic, with claimant falling on a concrete floor, landing on her buttocks. Claimant experienced immediate pain and was taken to the hospital by ambulance. The Board finds the prevailing factor leading to claimant's T10 fracture was the fall on the concrete floor. Both Dr. Murati and Dr. Ciccarelli rated claimant's T10 fracture at 15 percent to the whole person. However, Dr. Murati also rated claimant's low back, for pain and radiculopathy. When pressed on cross examination, Dr. Murati agreed claimant was experiencing no radiculopathy as the result of the T10 fracture. The Board finds claimant suffered a 15 percent permanent partial whole person functional impairment as the result of the fall on August 8, 2011, based upon the opinion of Dr. Ciccarelli. Respondent's argument that this is a personal risk of claimant's and thus not compensable, is not supported by this record.

K.S.A. 2011 Supp. 44-510e(a) states:

(a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.
(1) Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.
(2) (A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:
(i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;
(ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or
(iii) the loss of or loss of use of both eyes.
(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.
(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.
In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.
(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician

as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

(F) The amount of compensation for whole body injury under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section: (1) The payment rate shall be the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66 2/3%; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto; (2) weeks payable shall be determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(C), whichever is applicable.

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this

> section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

Dr. Ciccarelli determined claimant had the ability to return to work for respondent and perform her regular job after the T10 fracture had healed. Dr. Murati found claimant very limited in her ability to work, eliminating 6 of 7 former tasks for a task loss of 86 percent. However, as noted above, Dr. Murati was unwilling to discuss claimant's osteoporosis and how it would or would not affect her ability to return to work. The Board finds the opinion of Dr. Ciccarelli to be the most persuasive. Claimant's inability to work stems from her preexisting osteoporosis and not from the T10 fracture. Permanent partial general disability must be sustained on account of the injury. That is not the case here. Claimant has the ability to return to work and earn a comparable wage, except for the osteoporosis. That condition preexisted her accident and is the sole basis for claimant's work disability. The Board therefore finds claimant is limited to her whole person functional impairment.

K.S.A. 2011 Supp. 44-510c(a) states:

> Where death does not result from the injury, compensation shall be paid as provided in K.S.A. 44-510h and 44-510i, and amendments thereto, and as follows: (a)(1) Where permanent total disability results from the injury, weekly payments shall be made during the period of permanent total disability in a sum equal to 662/3% of the average weekly wage of the injured employee, computed as provided in K.S.A. 44-511, and amendments thereto, but in no case less than $25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511, and amendments thereto, per week. The payment of compensation for permanent total disability shall continue for the duration of such disability, subject to review and modification as provided in K.S.A. 44-528, and amendments thereto.
> (2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.
> (3) An injured worker shall not be eligible to receive more than one award of workers compensation permanent total disability in such worker's lifetime.

Additional benefits for a permanent partial general disability or a permanent total award are denied. Claimant has the ability to return to the open labor market and earn a comparable wage stemming from this work-related accident. In this regard, the award of the ALJ is reversed.

K.S.A. 2011 Supp. 44-510h(a) states:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The award grants claimant all authorized medical expenses related to the treatment of claimant's injuries subject to the Kansas Workers Compensation Schedule of Medical Fees, and future medical treatment upon proper application. That portion of the award is modified to grant claimant authorized medical treatment, but future medical treatment shall be limited to reasonable and necessary treatment for the T10 fracture. Additional treatment for the osteoporosis is disallowed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 15 percent permanent partial whole person functional impairment, future medical treatment upon application for the T10 fracture, but reversed with regard to an award for a permanent partial general disability or a permanent total disability award. Claimant has satisfied her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment and the accident was the prevailing factor leading to her 15 percent whole person functional impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated June 3, 2013, is modified to limit claimant's award to a 15 percent whole person functional impairment, with future medical treatment awarded upon application for the T10 fracture only. In all other regards, the award of the ALJ is affirmed in so far as it does not contradict the findings and conclusions contained herein.

Claimant is entitled to 9.71 weeks of temporary total disability compensation at the rate of $507.16 per week or $4,924.52 followed by 62.25 weeks permanent partial whole person functional impairment at the weekly rate of $507.16, in the amount of $31,570.71, for a total award of $36,495.23, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge